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In the Supreme Court of the United States

OCTOBER TERM, 1946

ESTATE OF SIDNEY M. STRICK, DECEASED, ET AL.,
ETC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1144

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, ET AL., ETC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The findings of fact and memorandum opinion of the Tax Court (R. 126–129) are not reported. The opinion of the Circuit Court of Appeals (R. 151–158) is not reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 28, 1946 (R. 159), and a petition for rehearing was denied on January 23, 1947 (R. 201). The petition for a writ of certiorari was filed on March 21, 1947. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, under Illinois law, the decedent had a reversionary interest by operation of law with respect to the property he transferred in trust in 1920.

2. If so, whether the value of the trust property is includible in decedent's gross estate under Section 811 (c) of the Internal Revenue Code as a transfer intended to take effect in possession or enjoyment at or after his death.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and Treasury Regulations are set forth in the Appendix, *infra,* pp. 12–14.

STATEMENT

The pertinent facts as stipulated (R. 25–26) and found by the Tax Court (R. 126–129) may be summarized as follows:

Petitioners are the executors of the estate of Sidney M. Spiegel, who was born on August 16, 1872, and died testate on December 19, 1940. The decedent left surviving him two daughters, Katherine J. Spiegel, born March 1, 1897, and Julia S. Michels, born March 7, 1907, a son, Sidney M. Spiegel, Jr., born August 8, 1904, and three grandchildren, Robert Michels, Jr., born

August 21, 1930, Helen Katherine Michels, born November 17, 1936, and Sydney Ann Michels, born November 14, 1938. (R. 126.)

On January 2, 1920, the decedent executed a trust agreement under which he transferred to himself and Modie J. Spiegel as trustees, 625 shares of Spiegel's House Furnishing Company and 750 shares of Spiegel May Stern Company. The trust agreement provided that during the life of decedent the trust income was to be divided into three parts and paid or used for the maintenance, support and education of each of decedent's three children and that, in the event any of the decedent's three children predeceased the decedent, the share of the deceased child was to go to his or her children and, if none, to the surviving children of decedent and their descendants, *per stirpes*. (R. 126–127.) The provisions for distribution of the trust income and corpus were as follows (R. 86–87):

> 2. The Trustees, and the survivor of them, and any successor trustee, shall collect and receive all income derived therefrom, or from any substitutes therefor, and shall during the life of myself, said Sidney M. Spiegel, divide said net income into three (3) equal parts, and pay or use one of said parts of said income to or for the maintenance, support and education of my three (3) children, Katharine J. Spiegel, Sidney M. Spiegel, Jr. and Julia K. Spie-

gel,—such income to be distributed at convenient intervals each year. In the event that any of my said three (3) children shall die prior to my death, then the share of such income to which such deceased one of said three (3) children would have been entitled shall go to the child or children of such deceased child of mine, in equal parts, and if there be no such child or children of any such deceased child of mine, then such income shall be divided equally among the survivors of said three (3) children of mine, and their descendants, per stirpes and not per capita.

3. Upon my death, the said Trustees, and the survivor of them, or any successor Trustee, shall divide said trust fund, and any accumulated income thereon then in the hands of said Trustees, equally among my said three (3) children, and if any of my said children shall have died, leaving any child or children surviving, then the child or children of such deceased child of mine shall receive the share of said trust fund to which its or their parent would have been entitled, and if any of my said three (3) children shall have died without leaving any child or children him or her surviving, then the share to which such deceased child of mine would have been entitled shall go to my remaining children, and the descendants of any deceased child of mine per stirpes and not per capita.

Paragraph 6 of the trust instrument provided (R. 87):

> 6. None of the beneficiaries of the trust estate shall at any time be permitted to anticipate the payments to which any of them may be entitled hereunder by any order, assignment or otherwise.

The property was delivered to and accepted by the trustees on the date of the trust agreement (R. 128).

Until the death of the grantor, the income of the trust was distributed to or for the benefit of the grantor's three children. Following the death of the grantor, the entire corpus and accumulated income were distributed equally to the grantor's three children. (R. 128.)

No part of the corpus held by the trustees at the grantor's death was included in the gross estate shown on the estate tax return filed by the executors of the grantor's estate, which showed a tax of $180,404.41. This amount was paid on March 19, 1942. In recomputing the estate tax, the Commissioner included in the decedent's gross estate $1,140,606.30, the fair market value of the entire trust corpus, and accumulated income held by the trustees on December 19, 1940, the agreed date for the purposes of Section 811 (j), Internal Revenue Code, of the distribution of the property of the three beneficiaries. (R. 128.)

The transfers of the property to the above trust on January 2, 1920, were not made in contemplation of death (R. 128).

On the basis of these facts, the Tax Court held that the value of the trust was not includible in decedent's gross estate under Section 811 (c) of the Internal Revenue Code. This holding was based on the Tax Court's conclusion that, in creating the trust, the decedent had retained no "string or tie" amounting to a possibility of reversion and that, therefore, the doctrine of *Helvering* v. *Hallock,* 309 U. S. 106, and decisions derived from it, are inapplicable (R. 129). The Circuit Court of Appeals reversed, holding that the decedent had a reversionary interest by operation of law which required the inclusion of the value of the trust property in his gross estate (R. 151–158).

DISCUSSION

1. Five circuit courts of appeals, the court below included, have held that a reversionary interest, commonly described as a possibility of reverter by operation of law, is sufficient to support taxability under Section 811 (c) of the Internal Revenue Code. *Commissioner* v. *Bayne's Estate,* 155 F. 2d 475 (C. C. A. 2d); *Commissioner* v. *Bank of California,* 155 F. 2d 1 (C. C. A. 9th), certiorari denied, October 14, 1946; *Thomas* v. *Graham,* 158 F. 2d 561 (C. C. A. 5th); *Beach* v. *Busey,* 156 F. 2d 496 (C. C. A. 6th), certiorari

denied, January 6, 1947. Nevertheless, the Tax Court refused to follow these decisions when, in *Estate of Hughes* v. *Commissioner*, 7 T. C. 1348, another case involving a possibility of reverter by operation of law, it held that the decedent's transfer in trust was not taxable under Section 811 (c) and recognized that its decision was in conflict with *Commissioner* v. *Bayne's Estate, supra*. Further, while three of the above-mentioned decisions of the circuit courts of appeals, including the decision below, have been reversals of the Tax Court on appeals by the Commissioner, the Circuit Court of Appeals for the Third Circuit recently held in *Commissioner* v. *Estate of Church*, decided March 17, 1947 (1947 P-H, par. 72,389) another of these cases involving a possibility of reverter by operation of law, that the Tax Court's decision, holding that the decedent's *inter vivos* transfer in trust was not taxable under Section 811 (c), was conclusive under this Court's decision in *Dobson* v. *Commissioner*, 320 U. S. 489. In the present case, the court below stated that the question presented was a pure question of law and reviewable. (R. 158). Accordingly, although the decisions of this Court in *Fidelity Co.* v. *Rothensies*, 324 U. S. 108, and *Commissioner* v. *Estate of Field*, 324 U. S. 113, would seem to have sufficiently pointed the way for decision in these cases on both the question of taxability and of

reviewability, the presently existing circumstances require a specific decision by this Court on both questions.

2. Review would not seem to be warranted, however, of the ruling of the court below that the decedent had a possibility of reverter by operation of Illinois law. There is no conflict of decisions on that aspect of the case. While *Laehenmeyer* v. *Gehlbach*, 266 Ill. 11, much stressed by petitioner, would seem to indicate that the remainder interests under the trust created by the decedent were vested, none of the decisions cited by petitioner supports its contention that a vested remainder, subject to divestment by the remainderman's death before that of the decedent, passes to the heirs of the remainderman when the divesting condition occurs. Indeed, *Routt* v. *Newman*, 253 Ill. 185, approved and relied upon in *Glaser* v. *Chicago Title & Trust Co.*, 393 Ill. 447, looks the other way, and affords substantial confirmation for the view of the court below that upon divestiture of the remainder interests and failure of the gifts over, the trust corpus would have reverted to the decedent. In that case, it was held that certain trust income reverted to the testator's estate as intestate property under circumstances similar to those which might have occurred in the present case. Particular reliance was placed on a provision of the trust instrument precluding the beneficiaries from anticipatorily

assigning or otherwise transferring any payments to them. The instant trust instrument contains a like provision, as shown in the Statement, *supra*, p. 5. Petitioner concedes (Pet. 16–17) that the decedent would have had a possibility of reverter by operation of Illinois law if the remainders to the decedent's children were contingent remainders. And it is significant in this connection that the Supreme Court of Illinois has several times stated that the question whether a remainder is contingent or vested subject to divestment by the death of the remainderman prior to the death of the life tenant is not of importance, because for all practical purposes they are the same. See *Knight* v. *Pottgieser*, 176 Ill. 368, 376; *Cummings* v. *Hamilton*, 220 Ill. 480; *Baley* v. *Strahan*, 314 Ill. 213, 219–220.[1]

Whether there was here a possibility of reverter by operation of law is a question determinable solely under Illinois law. In the absence of a showing of plain error, this Court should "leave undisturbed the interpretation placed upon purely local law * * * by three circuit judges whose circuit includes" Illinois. *MacGregor* v. *State Mutual Co.*, 315 U. S. 280, 281. Because, under the Tax Court's view, see R. 129, the exist-

[1] In *Baley* v. *Strahan*, *supra*, the principle was held inapplicable to a case in which the question was whether the remainder interest could be sold, since, if it was a contingent remainder, it could not be sold and, if a vested remainder, it could be sold.

ence of a possibility of reverter by operation of law was irrelevant, that court made no determination on this aspect of the case. Consequently, there is not even a problem here as to whether to "prefer the view of the Board of Tax Appeals concerning Illinois law to that of the Circuit Court of Appeals within which Illinois is embraced." *Helvering* v. *Stuart,* 317 U. S. 154, 164. Finally, the local law aspect of this case is plainly of no general importance, each case turning, as it must, on its own facts. *Glaser* v. *Chicago Title & Trust Co., supra.*[2]

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[2] Since, in the instant case, the decedent had created a trust which was to endure for the period of his own life, had made himself trustee with power, together with Modie J. Spiegel, to manage the trust corpus (R. 86), had provided for the distribution of the trust outright at his death, and had provided for distribution of both trust income and corpus to blood relatives, he could hardly have intended that, upon a failure of the trust during his lifetime, the remainders to his children were not only to be accelerated and enlarged but were to vest indefeasibly, free from his control, in persons who might not be his blood relatives. While the attorney who drew the trust instrument testified that decedent intended that the property "should be transferred to the trustees for the benefit of his children, and that he wanted at no time to have any interest or title to the property" (R. 34), decedent's intent must be gathered from the terms of the trust instrument. He may perhaps have believed that at least one of his children or one of the descendants of one of them would survive him, and that for that reason he had retained no interest in the trust property, but this is no indication that he intended that if none of the children or their descendants survived him, the trust property was to go to his children's heirs or appointees.

CONCLUSION

Certiorari, if granted, should be limited to the question whether the court below was correct in, and not precluded from, holding that decedent's so-called possibility of reverter by operation of law requires the inclusion in his gross estate, under Section 811 (c) of the Internal Revenue Code, of the value at his death of his *inter vivos* transfer in trust. This case does not call for review of the further question whether, under Illinois law, the decedent had a so-called possibility of reverter by operation of law.

Respectfully submitted.

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APPENDIX

Internal Revenue Code:

> SEC. 811. GROSS ESTATE.
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> * * * * *
>
> (c) *Transfers in contemplation of, or taking effect at death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * * except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *
>
> * * * * *
>
> (26 U. S. C. 1940 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

> SEC. 81.17. [as amended by T. D. 5512, 1946–1 Cum. Bull. 264]. *Transfers intended to take effect at or after the decedent's death.*—A transfer of an interest in property by the decedent during his life (other than a *bona fide* sale for an adequate and full consideration in money or money's worth) is "intended to take effect in pos-

session or enjoyment at or after his death," and hence the value of such property interest is includible in his gross estate, if—

(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and

(2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise).

The decedent shall not be deemed to possess a right or interest in the property if his right or interest consists solely of an estate for his life. (For regulations concerning the separate provision of the statute dealing directly with the case of a life estate retained in property transferred by the decedent, see section 81.18.) Where possession or enjoyment of the transferred interest can be obtained by beneficiaries either by surviving the decedent or through the occurrence of some other event or through the exercise of a power, subparagraph (1) shall not be considered as satisfied unless, from a consideration of the terms and circumstances of the transfer as a whole, the power or event is deemed to be unreal, in which case such event or power shall be disregarded. Except as provided in the last paragraph of this section, the value of the property so transferred is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916.

* * * * *

Example (7). The decedent transferred property in trust to pay the income to his son during decedent's life, and at decedent's

death to pay the principal to his son if living; if not, to his son's issue surviving both the son and the decedent. In this case, the property may revert to the estate of the decedent if neither his son nor his son's issue survives him. Moreover, neither the son nor the latter's issue can obtain possession or enjoyment of the property unless they survive the decedent. The entire value of the estate in remainder is, therefore, includible in the latter's gross estate.

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